



A Guide To Drafting A Formal Subcontractor Agreement



The use of individual subcontractors in the construction and trades industry is widespread. Subcontractors provide a flexible and skilled workforce for businesses of all sizes in an industry where demand can be unpredictable and where regulation is already burdensome.

Subcontractors provide a professional service to businesses, are often the face of the business on site and their standard of work is integral to the success of any construction or trade business. Despite this, it is surprisingly common for there to be no formal contract in place between a contractor and individual subcontractor. It would be unheard of for a principal contractor not to ask a sub-contracting firm to sign a contract for a particular job and likewise, the majority of businesses will put into place a full contract of employment for its employees.

It should be no different with subcontractors. The chance of things going wrong is certainly no smaller with individual subcontractors, and is often actually far greater.

A properly drafted contract can in itself help prevent things going wrong as it makes clear the obligations on both parties and encourages good practice by those who sign up to the contract. And, in the event that things do go wrong, then a comprehensive and well constructed contract can minimise the costs and inconvenience to your business when resolving the problem.

A properly drafted contract can:

- Clarify the self-employed status of the subcontractor and reduce the likelihood of HMRC or an Employment Tribunal finding that the subcontractor is in fact an employee or worker. Such a decision would attract liability to pay Employer NI Contributions, Holiday Pay and Sick Pay and could also leave the business vulnerable to claims for unfair dismissal, redundancy payments and personal injury.
- Prevent a subcontractor touting for work directly from your clients and principal contractors. A widespread practice which can cut your business out after you have spent time and money on tending for business and cultivating profitable business relationships.
- Provide effective remedies if and when a subcontractor does not complete a job properly.
- Protect your business's position in the event that the client or principal contractor goes bust.
- Ensure that your subcontractors agree to abide by your Health and Safety systems of work and where necessary put into place their own risk assessments etc.
- Ensure that your subcontractor agrees to put in place proper and appropriate insurance.

Drafting a Contract

Stage 1: Preparation

Before you start drafting your contract you need to ensure that you have all the relevant information to hand and then consider what the nature of the contractual relationship is.

Information you will require includes:

- Any main contract(s) which you are a party to and which govern the work which you will be subcontracting out;
- Any documentation relevant to the work which the subcontractor will be carrying out, for example
 - A Construction Phase Health and Safety Plan
 - Schedule of works / purchase order
 - Industry standards
- Proof of the subcontractors competence such as industry accreditation, insurance certificates, employee training records

The form of the contract will depend on the nature of the contractual relationship. If the work is a large, high value project then you should consider drafting a contract specifically for that job only.

If, on the other hand, you will be contracting out a number of different smaller projects out to the subcontractor then a Framework Terms and Agreement may be more appropriate; this would contain all the standard terms and conditions that would apply to each and every project and you would append it with a schedule of works or purchase order which detailed the specifics of each job to be carried out, such as pricing, job description and site details. This approach cuts down on administration and resources as you do not need to draft and print a whole new contract each time you engage that contractor.

Finally, you need to identify the issues and topics the contract needs to cover. The following list may assist you:

- Obligations of the contractor;
- Obligations of the subcontractor;
- Compensation;
- Invoicing and payment terms;
- Termination;
- Insurance and indemnities;
- Health and Safety;
- Insolvency of client or principal contractor;
- Taxation;
- Employment status;
- Substitution; and
- Plant, tools and equipment.



Stage 2: Drafting the Contract

Once you have collected all the relevant information and decided on the form of the contract you are ready to begin drafting.

To make it easier to organise the document set out the headings of the various clauses first. As a general rule it is best to start with the overarching principals of the relationship such as the basis upon which work will be offered and accepted and the provision of tools, plant and equipment.

After this the fundamental particulars of the agreement should be set out such as invoicing and payment terms, health and safety responsibilities or insurance and tax liabilities

Finally any administrative matters should be covered such as how and to where formal notices should be sent and which courts will have jurisdiction over the contractual arrangement.

When you are drafting the agreement it is important to strike a balance in clauses which can provide a minimum level of certainty and clarity should a certain issue become the subject of a dispute, but which is sufficiently flexible to avoid placing overly restrictive terms on yourself.

Drafting is a skill which lawyers develop over many years (which is why they can charge steep rates for doing so) but with careful consideration there is no reason why a lay person cannot produce a clear and effective contract.

Finally, you should ensure that the agreement accurately reflects the actuality of how the relationship will be managed in practice. Where the reality differs greatly from the contractual provisions there is a significant risk the courts will find the contract to be a sham if they ever have to determine it.

Stage 3: Negotiation and Agreement

One matter often overlooked when implementing a contract with a subcontractor, especially if they are an individual, is the need to negotiate the terms and conditions of the agreement.

One of the factors HMRC or the courts will consider when determining the employment status of an individual subcontractor is the bargaining position of each party. Where a contractor has told a subcontractor that they need to sign a contract as it stands or there will be no more work offered to them the courts have found that this indicates an employer - employee relationship as the parties are in very unequal bargaining positions.

Therefore it is vital that once you have produced a contract you ask the subcontractor to review it and raise any concerns or queries. Where the subcontractor is unhappy with any aspect of the agreement you should seek to amend it in a way which is amenable to each party.

By following such a process you will be able to prove that the parties were on a relatively equal footing, a situation which is indicative of a contractor – subcontractor relationship.

Further Assistance

If you would like advice or assistance on contracts for subcontractors then please call us on **01752 697370** or drop us an email to [**info@smasltd.com**](mailto:info@smasltd.com). We offer both software solutions, which can generate comprehensive and effective contracts for use with general subcontractors, and a bespoke contract drafting service should you have any specific and non-standard requirements.

For further information please call us on **01752 697370** or visit [**smasltd.com**](https://smasltd.com).

